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No. _____

In The

Supreme Court of the United States

October Term, 1981

JOHN G. RINALDO LIMITED PARTNERSHIP NUMBER 14, JOHN G. RINALDO, and GAY TAVI RINALDO,
Petitioners,

v.

ROADRUNNER LAKE PARKS, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Andrew R. Sherwood
Andrew G. Klein
Gordon E. Dudley
LEVY, MASON & SHERWOOD, P.A.
100 W. Washington, Suite 1860
Phoenix, Arizona 85003
(602) 254-7041
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether a United States Court of Appeals may render a decision which has the effect of depriving litigants of property rights without notice or hearing in violation of the Due Process Clause of the Fifth Amendment.

2. Whether a United States Court of Appeals may render a decision which violates the concept of "comity" existing between State and Federal Judiciaries by nullifying a State Court ruling in an action not before the United States Court of Appeals for review.

3. Whether the parties and Trial Court Judge may agree that a particular issue will not be considered to have been litigated by the Trial Court's ruling and whether that agreement is binding on a United States Court of Appeals reviewing a separate but related action.

4. Whether a United States Court of Appeals may reverse a United States District Court Judgment and remand the action for entry of judgment on grounds that were never raised by the parties in proceedings before either the District Court or the Court of Appeals.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the United States Court of Appeals for the Ninth Circuit, the parties were: John G. Rinaldo Limited Partnership Number 14, John G. Rinaldo and Gay Tavi Rinaldo, Plaintiffs/Appellees, and Roadrunner Lake Parks, Inc., Shepherd Terman, Irving E. Geyer, and Ronald Y. Wainer, Defendants/Appellants.

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OPINIONS BELOW

There is no reported or unreported opinion of the District Court. The District Court's Judgment granting summary judgment for Plaintiffs is attached as Appendix A.

The Ninth Circuit's opinion is a memorandum decision and therefore, no citation is available. The Ninth Circuit's Opinion is attached as Appendix B.

A copy of the Ninth Circuit's Order denying the Petition for Rehearing filed by Plaintiffs/Appellees is attached as Appendix C.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was issued on February 18, 1982. A Petition for Rehearing was denied on March 29, 1982. The Petition for Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of the Supreme Court of the United States to review this case on Petition for Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use without just compensation.

STATEMENT OF THE CASE

In April of 1974, John G. Rinaldo Limited Partnership No. 14 (the Petitioners are collectively referred to herein as "Rinaldo") entered into an agreement to purchase from Roadrunner Lake Parks, Inc. (the Respondents are collectively referred to herein as "Roadrunner") a leasehold interest and improvements commonly known as the Roadrunner Trailer Park, located on the Salt River Pima Indian Reservation, Arizona. Pursuant to the Purchase Contract and Escrow Instructions, Rinaldo executed a promissory note for $332,215.36 secured by a Second Deed of Trust for the deferred balance of the purchase price.

Subsequent to the close of escrow, various disputes arose between the parties. These disputes concerned, among other things, claims involving several hundred thousand dollars which Rinaldo believed he had against Roadrunner.

One of the disputes, regarding the proration of rents which was to have taken place at the close of escrow, became the subject of a lawsuit in the Superior Court of Maricopa County. However, at the time the "prorate suit" was commenced, no legal proceedings had yet been initiated with respect to any of the other claims and disputes.

Prior to the conclusion of the prorate suit, in an effort to resolve all of their outstanding differences and disputes, the parties negotiated an agreement involving dismissal by Stipulation of the prorate suit upon Rinaldo paying $17,000 to Roadrunner and each party agreeing to release the other "from all claims whatsoever." A document entitled Mutual Release was prepared by counsel

for Roadrunner and executed by Roadrunner's Vice President. The Mutual Release specifically provided for each party to release the other:

> "... from any and all sums of money, accounts ... claims and demands, whatsoever which either of them at any time had, now has, or might otherwise hereafter assert against the other party, for or by reason of any act ... or thing which has occurred up to June 1, 1976."

As a result of the execution of this agreement, Rinaldo gave up his numerous claims against Roadrunner which he and his attorney felt had a potential value of several hundred thousand dollars. Similarly, Rinaldo believed that Roadrunner gave up its claims for "sums of money" due per the 1974 Note secured by the Second Deed of Trust.

After the Mutual Release agreement was executed by all parties, counsel for Roadrunner attempted to have Rinaldo execute a modified form of Mutual Release which would not have had the effect of discharging the 1974 Promissory Note. Rinaldo, however, refused to sign the modified document because the original Mutual Release, as drafted by Roadrunner's counsel, represented the agreement of the parties.

After Rinaldo refused to sign the modified Mutual Release, Roadrunner proceeded to negotiate the $17,000 check which Rinaldo had given to Roadrunner in accordance with the terms of the oral agreement, and on September 27, 1976, Superior Court Judge Stanley Z. Goodfarb dismissed the prorate suit pursuant to the parties written Stipulation.

On October 20, 1976, Roadrunner's attorney filed a motion pursuant to Arizona Rule of Civil Procedure 60(c) to have the September 27, 1976 Order of dismissal set aside. During oral argument on the Rule 60(c) Motion, Roadrunner's attorney assured the Court and Rinaldo

that in asking that the dismissal of the prorate suit be set aside, he was not asking the Court to litigate the effect of the Mutual Release agreement. Roadrunner's attorney stated:

> *"I don't want to litigate the effect of the release."* (Appendix D-2, lines 31–2) (Emphasis added).

Although Judge Goodfarb granted the Motion to Set Aside the Dismissal, he specified that, in reaching his decision, he too was not adjudicating issues relating to the Mutual Release:

> *"I'm not going to litigate the release. I'll set aside the dismissal."* (Appendix D-2, lines 37–8) (Emphasis added).

In the Spring of 1978, the Respondents instructed the Trustee of the Second Deed of Trust to institute a trustee sale to take place on September 15, 1978. On September 1, 1978, Rinaldo initiated this action in the United States District Court of Arizona against the Trustee, seeking to enjoin the trustee sale and to have the Deed of Trust reconveyed on the grounds that the Note had been discharged by the Mutual Release. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship.

Rinaldo's Order to Show Cause for a Preliminary Injunction came on for hearing before United States District Court Judge Walter E. Craig on September 12, 14 and 19, 1978 and on December 18, 1978. After considering all the evidence presented to him, Judge Craig granted the Preliminary Injunction and entered his formal written findings on February 26, 1979.

On September 21, 1979, Rinaldo moved for Partial Summary Judgment seeking a determination that the Promissory Note was within the purview of the Mutual Release Agreement and had therefore been discharged.

On October 22, 1979, Judge Craig granted summary judgment in favor of Rinaldo.

On July 7, 1980, Roadrunner moved to amend its Answer and cross-moved for summary judgment against Rinaldo. The Motion to Amend and Cross-Motion for Summary Judgment were denied on July 11, 1980, and a final appealable Judgment was entered in favor of Rinaldo on his Summary Judgment the same day (Appendix A).

On appeal, the Ninth Circuit reversed the District Court's granting of summary judgment in favor of Rinaldo and remanded the action for entry of judgment in favor of Roadrunner, on the grounds that the Mutual Release lacked consideration after the settlement of the State Court prorate suit had been set aside (Appendix B).

REASONS FOR GRANTING THE WRIT

I. *A United States Court of Appeals May Not Be Allowed to Render a Decision Which Has the Effect of Depriving Litigants of Property Rights Without Notice or Hearing in Violation of the Due Process Clause of the Fifth Amendment.*

In reversing the District Court's Judgment in favor of Rinaldo and remanding the action for entry of Judgment in favor of Roadrunner, the Ninth Circuit has visited upon Petitioners a result that is both unduly harsh in its impact and unconstitutional. The effect of the Ninth Circuit's decision, as will be addressed in greater detail *infra*, deprives Petitioners of significant property rights in violation of the Due Process Clause of the Fifth Amendment. In that regard, the importance of the question presented and the impairment to the integrity of the judicial process if the Ninth Circuit is permitted to disregard such fundamental constitutional principles in its appellate

dispositions demand that this Court grant certiorari to review the Judgment below.

There can be no question that in the instant case, both Roadrunner's counsel and the Superior Court Judge stated that the setting aside of the dismissal of the State Court Action was not to be construed as litigating the effect of the Mutual Release (Appendix D). By their expressed statements, both parties and the Court treated the Mutual Release as separate, distinct and severable from the Court's Order Setting Aside the Dismissal. Accordingly, issues relating to the effect of the Mutual Release remained available for judicial adjudication and finally were addressed by a court for the very first time when District Court Judge Craig considered these issues in connection both with Rinaldo's Application for a Preliminary Injunction and, later, with his Motion for Summary Judgment.

There also should be no question that, the Ninth Circuit's analysis of the facts notwithstanding, the Mutual Release had its own internal considerations since both parties were waiving various claims they believed they legitimately had in return for the other parties' execution of the Release. It was the mutual promises relating to the waiver of those other claims and of the sums of money owed pursuant to such claims, not the dismissal of the prorate lawsuit, which constituted the consideration for the Mutual Release.

Further, the Mutual Release involves significant contractual rights. If, as the District Court held, the Mutual Release discharged Petitioners from the obligation of the 1974 Promissory Note secured by the Second Deed of Trust, they have been released from a debt with a present value exceeding $500,000. On the other hand, if, as Respondents contend, the Mutual Release does not contemplate and should not have the effect of discharging the Promissory Note, then Petitioners may be responsible

for a debt they assumed to have been discharged many years ago.

The Fifth Amendment to the United States Constitution specifies that no person shall be deprived of property without due process of law. Contractual rights are property and thus within the scope of the Fifth Amendment. *Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *United States v. Central Pac. Ry. Co.,* 118 U.S. 235, 6 S.Ct. 1038, 30 L.Ed. 173 (1886); *Ballstaedt v. Amoco Oil Co.,* 509 F.Supp. 1095 (N.D. Iowa 1981); *Trozze v. Drooney,* 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (1962). Accordingly, the rights Rinaldo claims to have by virtue of the effect of the Mutual Release Agreement are constitutionally protected.

Moreover, this Court has consistently ruled that procedural due process requires that some form of hearing be held before an individual is finally deprived of a property interest. *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974). *See also Phillips v. Commissioner of Internal Revenue,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). In that regard, the right to be heard must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). *See Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed 1363 (1914).

This Court also has not hesitated to accept cases for review when important issues are involved or where the result reached below is unduly harsh in its impact. *See, e.g., Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), where certiorari was granted because of the importance of the question presented; *Montana v. Kennedy,* 366 U.S. 308, 309, 81 S.Ct. 1336, 1337, 6 L.Ed.2d 313 (1961), where certiorari was granted "in view of the apparent harshness of the result entailed"; and

Williams v. Lee, 358 U.S. 217, 218, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), where certiorari was granted both because there was "an important question" and because of a "doubtful determination" by the Court below. *See also, Reading Company v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968); *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

In the instant case, the Ninth Circuit's decision deprives Rinaldo of his property rights under the Mutual Release Agreement without first providing a meaningful opportunity for a hearing to present evidence regarding this deprivation. No hearing was afforded Rinaldo on the validity and effect of the Mutual Release before Judge Goodfarb, since Judge Goodfarb expressly stated that he was not litigating issues related to that document.

Additionally, under the Ninth Circuit's ruling, Rinaldo has effectively been denied a hearing before District Court Judge Craig, since all issues related to the Mutual Release would have to be considered already to have been resolved by the setting aside of the dismissal in the state prorate suit. This is so because the Ninth Circuit's Memorandum Decision holds that (1) Judge Craig was without authority to hear evidence to determine independently the effect of the Mutual Release, since (2) Judge Goodfarb's ruling setting aside his earlier Order of Dismissal rendered the Mutual Release ineffective, despite anything to the contrary that Judge Goodfarb might have stated at the time.

The result is that Rinaldo has been deprived of property rights in violation of the Due Process Clause of the Fifth Amendment.[1] This unconstitutional depriva-

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[1]A court decision, such as that rendered by the Ninth Circuit on February 18, 1982, which has the effect of depriving persons of property without first affording them a fair and meaningful oppor-

tion is compounded by the fact that Rinaldo had no notice that such a significant deprivation was even imminent. Certainly Rinaldo did not have notice that Judge Goodfarb's ruling would render the Mutual Release ineffective, since Rinaldo was expressly told by opposing counsel and by the State Court Judge that the Mutual Release was not being litigated in connection with the determination of the Motion to Set Aside the Dismissal. These statements by opposing counsel and by the State Court trial Judge clearly establish that all parties and the State Court treated issues which were related to the Mutual Release as being separate, distinct and severable from the Order setting aside the dismissal.[2]

Further, it cannot even be argued that Roadrunner's appeal to the Ninth Circuit placed Rinaldo on notice that the setting aside of the dismissal in State Court would be dispositive of issues concerning the Mutual Release, since Roadrunner never raised the issue of lack of consideration in the context addressed by the Ninth Circuit in any of the briefs it filed on appeal. The end result is that, by virtue of the Ninth Circuit's Memorandum Decision, a ruling which a State Court Judge said would

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tunity to present evidence regarding their deprivation, constitutes the type of governmental action which brings this deprivation within the purview of the Due Process Clause of the Fifth and Fourteenth Amendments. *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (D. Hawaii 1978).

[2]When Roadrunner attempted to insert a finding on the effect of the Mutual Release Agreement into the proposed form of Order submitted to the State Court in connection with the granting of the Motion to Set Aside the Dismissal, this was objected to by Rinaldo. By minute entry dated December 1, 1976, Judge Goodfarb sustained Rinaldo's objection to the form of Order on the grounds that Roadrunner was seeking to have the validity and effect of the Mutual Release adjudicated in the context of the setting aside of the dismissal of the prorate suit.

not "litigate" a contract document is going to be considered to have done exactly that.

Accordingly, if the Ninth Circuit's decision in this case is allowed to stand, a United States Court of Appeals ruling will have become the vehicle for depriving litigants of property rights without notice or hearing in violation of the Due Process Clause of the Fifth Amendment. It is respectfully submitted that such a result is unconstitutional, and the proper supervision of the Federal judiciary demands that this Court grant certiorari to review the judgment below.

II. *A United States Court of Appeals May Not Be Allowed to Render a Decision Which Violates the Concept of "Comity" Existing Between State and Federal Judiciaries and Which Exceeds the Appropriate Jurisdiction of an Appellate Court by Nullifying a State Court Ruling that is Not on Appeal.*

United States Courts of Appeals only have such jurisdiction as is conferred upon them by law. *United States v. June*, 503 F.2d 442 (8th Cir. 1974). The jurisdiction of the United States Courts of Appeals is created by Title 28, U.S.C. § 1291 *et seq.* It is generally recognized that the jurisdiction of the Circuit Courts is limited to reviewing the decisions of the United States District Courts, *United States v. Haley*, 541 F.2d 678 (8th Cir. 1974), and that Circuit Courts must refrain from deciding cases and questions which are not within their statutory jurisdiction. *See St. Lukes Hospital v. Melin*, 172 F.2d 532 (8th Cir. 1949).

There is no statutory authority for United States Courts of Appeals to review State court decisions. It was held in *United States ex rel. Parker v. Carey*, 135 F.2d 205 (7th Cir. 1943), that Circuit Courts have no power to review on Writs of Error Certiorari, the judgments of the

courts of the State of Illinois. Similarly, the Ninth Circuit Court of Appeals has no authority to review and nullify rulings by judges of the State Courts of Arizona where that State Court ruling is not before the Ninth Circuit for review.

This limitation on the jurisdiction of the United States Courts of Appeals is due in large measure to the fact that the integrity of the judicial systems of the States must be recognized and preserved. This principle, commonly referred to as Federalism or comity, was described by this Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), in the following manner:

> "[T]he notion of 'comity,' that is, a proper respect for state functions, [is] a recognition of the fact that the entire country is made up of a Union of separate governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform at their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and the dreams of 'Our Federalism.'. . . It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

Id. at 44-45, 91 S.Ct. at 750.

The Ninth Circuit, by its appellate disposition in this case, clearly has lost sight of this very basic and fundamental concept. The State Court Judge in the prorate suit expressly ruled that issues related to the Mutual Release would not be considered litigated as a result of the granting of the motion to set aside the dismissal of

the prorate action. Notwithstanding this ruling, the Ninth Circuit decided that the Mutual Release was not an agreement which could exist independent of the setting aside of the dismissal in State Court and therefore, had no force or effect when the dismissal of the prorate suit was set aside. Consequently, despite Judge Goodfarb's assurances to the contrary, and even though his ruling in the prorate suit was not before the United States Court of Appeals for review, the Ninth Circuit held that the setting aside of the dismissal in State Court did in fact litigate the Mutual Release and rendered it ineffective.

Simply put, the Ninth Circuit had no jurisdiction to nullify the State Court's ruling, but was bound instead by the doctrine of "comity" not to disturb such a ruling which was not properly before the Circuit Court on appeal. Such a severe abuse of the appellate process warrants the intervention of this Court to exercise its supervisory powers and grant certiorari to review the judgment below.

III. *This Court Does Not Appear to Have Ruled on the Important Right of Parties and Trial Courts to Specifically Limit or Designate the Issues Which Will be Affected by a Particular Ruling of the Trial Court.*

Most jurisdictions have long recognized that courts have inherent authority to designate which issues are being judicially resolved. *See Taylor v. Betts*, 59 Ariz. 172, 124 P.2d 764 (1942); *Henderson v. Snider Bros., Inc.*, 409 A.2d 1083 (D.C. App. 1979); *Bleeck v. State Board of Optometry*, 18 Cal. App. 3d 415, 95 Cal. Rptr. 860 (1971); *In Re Estate of Reardon*, 52 Cal. Rptr. 68 (Cal. App. 1966); *Town of Purcellville v. Potts*, 179 Va. 514, 19 S.E.2d 700 (1942); *Solarana v. Industrial Electronics, Inc.*, 50 H. 22, 428 P.2d 411 (1967).

Separate and apart from the court's authority to delineate the issues resolved, the parties to a lawsuit may reserve from determination an issue which otherwise would be disposed of by a court ruling. In *Wineglass Ranches v. Campbell*, 12 Ariz. App. 571, 473 P.2d 496 (1970), the Arizona Court of Appeals considered the effect of an issue which the trial court purported to resolve but which the parties to the lawsuit had indicated was being withheld from consideration. In concluding that where the parties indicate they are withholding an issue, a court may not, nevertheless, adjudicate the issue, the Court of Appeals stated as follows:

> "Far from finding a trial of the issue by consent, we perceive instead a clear intention by both parties, each undoubtedly for their own reasons, to keep the release issue out of the adjudicatory arena in this particular litigation . . . [P]arties may limit the scope of litigation if they choose, and if an issue is clearly withheld, the Court cannot nevertheless adjudicate it and grant corresponding relief."

473 P.2d at 500-501.

The Ninth Circuit, however, apparently does not agree that the parties or trial court have the right to determine, with regard to a particular trial court ruling, which issues were being reserved for a separate adjudication and which issues were in fact adjudicated by the ruling itself. By its Memorandum Decision dated February 18, 1982, the Ninth Circuit in this case blatantly disregarded the parties' representations and trial judge's ruling that matters relating to the Mutual Release were not to be considered litigated by the setting aside of the dismissal of the prorate suit, but were instead being reserved for a separate and unrelated adjudication. Such a practice is a serious abuse of appellate discretion, given that it is a significant and inherent right of all litigants and trial courts to agree as to those issues which shall

be considered to have been judicially resolved by a Court's rulings below.

Nor does it appear that this is a question which the Supreme Court of the United States has ever had occasion to pass upon. In this respect, the resolution of the question is important, because if Circuit Courts are permitted to disregard the right of the parties and trial court to reserve from determination an issue which otherwise would be disposed of by the trial court's ruling, a litigant can never be assured that matters which were not resolved in the lower court will not nevertheless be adjudicated on appeal.

For these reasons, this Court is respectfully requested to grant certiorari to consider on first impression the important right of parties and trial courts to specifically limit or designate the issues which will be affected by a trial court's ruling.

IV. *The United States Court of Appeals for the Ninth Circuit May Not Resolve an Appeal on Substantive Grounds Which Were Never Raised by the Parties in Proceedings Before Either the District Court or Court of Appeals, Contrary to this Court's Decision in* Singleton v. Wulff, *428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).*

The Ninth Circuit's reversal of the District Court's Judgment is predicated upon the affirmative defense of lack of consideration. According to the Ninth Circuit's Memorandum Decision dated February 18, 1982, the Mutual Release was not an independent agreement and therefore failed for lack of consideration when the dismissal of the State Court prorate suit was set aside. Although Rinaldo would dispute that the facts of the case support that theory of lack of consideration, it is not necessary to discuss the merits of this theory, since it was neither addressed by the State Court Judge nor in Fed-

eral District Court,[3] and was never raised as an issue on appeal. For the Ninth Circuit now to reverse the District Court upon these grounds is clearly an improper exercise of appellate jurisdiction and directly conflicts with the practices suggested by this Court and followed in other Circuits.

In *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 83 L.Ed. 1037 (1941), this Court stated that ordinarily appellate courts should forego review of issues which are neither raised nor submitted for determination in the trial court. Justice Black explained that this is

> "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

312 U.S. at 556, 61 S.Ct. at 721.

Similarly, in *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), the Eighth Circuit was found to have improperly exercised it appellate jurisdiction by reversing the District Court and reaching the

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[3]At one point, Roadrunner sought to amend its Answer to allege "failure of consideration" so as to provide a basis for arguing, in response to Rinaldo's Motion for Summary Judgment, that the claims Rinaldo gave up under the Mutual Release Agreement were inadequate to justify a discharge of the Promissory Note. However, nowhere in any pleading that Roadrunner filed was it ever alleged that the Mutual Release lacked consideration because the State Court Judge had set aside his earlier order of dismissal. Thus the fact that the words "failure of consideration" appear in the proposed Amended Answer is of no significance, since Roadrunner was at all times pursuing a defense which bore no relation to the lack of consideration theory relied upon by the Ninth Circuit as the basis for its reversal.

merits of a matter where the merits had not been briefed or addressed below. In that case, the Plaintiff's Complaint was dismissed in District Court for lack of standing before either party had the opportunity to present evidence or legal arguments in defense of their respective positions. This Court noted:

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below . . . We have no idea what evidence, if any, petitioner would, or could, offer in [his] defense . . . but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have. . . ."

428 U.S. at 120, 96 S.Ct. at 2877.

It is also the rule in Federal Appellate Courts that issues not raised below should not be considered by the Court of Appeals as a basis for reversal. *See, e.g., Lektro-Vend Corp. v. Vendo Co.*, 545 F.2d 1050, 1059 (7th Cir. 1976), *rev'd on other grounds*, 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977), where the Seventh Circuit said that "a trial court should not be reversed on grounds that were never urged or argued below;" and *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976), where the Eighth Circuit stated that "it is old and well-settled law that issues not raised in the trial court cannot be considered by this court as a basis for reversal." *See also United States v. State of S.D.*, 665 F.2d 837 (8th Cir. 1981); *Hettleman v. Bergland*, 642 F.2d 63 (4th Cir. 1981); *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423 (7th Cir. 1980); *Hodges v. United States*, 597 F.2d 1014 (5th Cir. 1979); *B&J Crane Rigging, Inc. v. Beker Resources Corp.*, 587 F.2d 1065 (10th Cir. 1978); *Miller v. Avirom*, 384 F.2d 319 (D.C. Cir. 1967).

By reversing the District Court on the basis that

the Mutual Release failed for lack of consideration, the Ninth Circuit improperly has exercised its appellate jurisdiction in several important respects. First, the Ninth Circuit has clearly based its reversal upon an issue that was never urged or argued in any of the proceedings below. During the hearings before Judge Craig and in the briefs filed on appeal, Roadrunner never once argued that the Mutual Release necessarily failed for lack of consideration because the dismissal of the State Court prorate suit was set aside. Although Roadrunner did at one point seek to amend its Answer to allege "failure of consideration," Roadrunner was pursuing a theory bearing no resemblance to that upon which the Ninth Circuit based its Memorandum Decision. Merely including an issue in an Answer but never developing that issue before the Trial Court should not allow that issue to be considered on appeal. *King v. Stevenson*, 445 F.2d 565 (7th Cir. 1971); *Desert Palace, Inc. v. Salisbury*, 401 F.2d 420 (7th Cir. 1968).

Second, it would have been egregious enough if the Ninth Circuit had "only" reversed the District Court upon grounds that were not raised in the briefs as issues on appeal. The Ninth Circuit, however, went beyond that point and remanded the action to the District Court to enter summary judgment in favor of Roadrunner upon a theory that is not even contained in Roadrunner's Summary Judgment Motion which the District Court was directed to grant. In that regard, the Ninth Circuit's Memorandum Decision clearly exceeds the proper scope of appellate review.

Finally, the Ninth Circuit's reversal effectively nullifies the hearing before Judge Craig, since all issues related to the Mutual Release would have to be considered to have previously been resolved by the setting aside of the dismissal in the State Court Action. Thus, it doesn't even matter that Judge Craig conducted evidentiary

hearings on four different days in connection with the Mutual Release Agreement because, by virtue of the Ninth Circuit's ruling, the Mutual Release was already a document which had no force or effect.

Consequently, Rinaldo never had a meaningful opportunity to present evidence or legal arguments regarding the Mutual Release in District Court, since the hearings that were held and the findings Judge Craig made were nullified by the Ninth Circuit's reversal. Nor did Rinaldo have that opportunity in State Court, since all the parties and State Court Judge expressly agreed that issues related to the Mutual Release were not being litigated. Therefore, what the Ninth Circuit's decision accomplishes is exactly what this Court found to be an improper exercise of appellate jurisdiction in *Singleton v. Wulff, supra;* that is, the Ninth Circuit has reversed the District Court and reached the merits of a matter on substantive grounds which were never briefed or addressed in any of the proceedings below.

In this respect, the Ninth Circuit's reversal is clearly in direct and irreconcilable conflict with decisions by this Court and other Circuits. More importantly, if certiorari is not granted and the Ninth Circuit continues to reverse the decisions of District Courts on grounds that were never argued or briefed below, there will be severe and adverse repercussions for other litigants similarly situated.

As the supreme law of this land, the Supreme Court's decisions and the policies supporting those decisions must be able to be relied upon by all litigants in all court proceedings. When a Circuit Court, however, issues a ruling contrary to a prior decision of this Court, the appellate process inevitably breaks down and ceases to function in an orderly, predictable and consistent manner. Justice Stevens recently articulated this point in *Thomas*

v. Washington Gas Light Co., 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980):

> "The doctrine of *stare decisis* imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; [footnote omitted] it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force. [Footnote omitted]" 448 U.S. at 272, 100 S.Ct. at 2656.

See also United States v. Mason, 412 U.S. 391, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

In the instant case, the Ninth Circuit's decision completely disregards the holdings of both *Hormel v. Helvering, supra,* and *Singleton v. Wulff, supra.* If the Ninth Circuit is permitted to continue disposing of appeals in this manner, litigants such as Rinaldo will never be able to rely upon the "supreme law of the land" in seeking to have their cases adjudicated fairly through the appellate process. Specifically, litigants have the right to rely upon the precedent of this Court that legal theories, whether they be lack of standing as raised by the Eighth Circuit in *Singleton v. Wulff, supra,* or lack of consideration as raised by the Ninth Circuit in this action, will not become dispositive issues unless and until each party has had the meaningful opportunity to address them. Such a basic concept is essential to the integrity of the appellate process and fundamental to the right of litigants to receive fair treatment by the judiciary.

Based upon the foregoing, it is submitted that the Ninth Circuit's Memorandum Decision dated February

18, 1982 disregards and irreconcilably conflicts with prior decisions of this Court and other Circuits. Accordingly, this Court is respectfully requested to grant certiorari to review the judgment below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Andrew R. Sherwood
Andrew G. Klein
Gordon E. Dudley
LEVY, MASON &
SHERWOOD, P.A.
100 W. Washington, Suite 1860
Phoenix, Arizona 85003
(602) 254-7041
Counsel for Petitioners

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

ANDREW R. SHERWOOD, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioners in this cause; that on this _____ day of June, 1982, he mailed three copies of the Petition for Writ of Certiorari in this cause by depositing the Petition in the United States mail, first class postage paid, to:

Mr. David N. Ramras
1110 E. McDowell
Phoenix, Arizona 85006;

and that 40 copies of the Petition were hand delivered to the Clerk of this Court in compliance with Supreme Court Rule 28, on the _____ day of June, 1982.

_____
Andrew R. Sherwood

SUBSCRIBED AND SWORN TO before me this _____ day of June, 1982.

_____
Notary Public

My Commission Expires:

_____

Appendix A — In the United States District Court for the District of Arizona

JOHN G. RINALDO LIMITED PARTNERSHIP NUMBER 14, JOHN G. RINALDO and GAY TAVI RINALDO,	)	
Plaintiffs,	)	
v.	)	
ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation, et al.; ROADRUNNER LAKE PARKS, INC.; SHEPHERD TERMAN; IRVING E. BEYER [*sic*]; and RONALD Y. WAINER	)	No. 78-698 PHX WEC JUDGMENT
Defendants.	)	

Plaintiff's Motion for Partial Summary Judgment on Count I of the Amended Complaint having come on for hearing before the Honorable Walter E. Craig on October 22, 1979, the Plaintiffs having appeared by and through their attorney Andrew R. Sherwood, Defendant ARIZONA TITLE INSURANCE AND TRUST COMPANY having appeared through its attorney John G. Graham and Defendants ROADRUNNER LAKE PARKS, INC., SHEPHERD TERMAN, IRVING E. BEYER [*sic*] and RONALD Y. WAINER having appeared through their counsel, Ronald Warnicke, the Court having considered all evidence and supporting memoranda submitted in support of the respective positions of the parties, as well as the arguments of counsel for the parties;

THE COURT FINDS:

1. That there exists no issues of material facts

in dispute which are necessary for the resolution of Plaintiffs' Motion for Partial Summary Judgment and all issues of law and fact material to the Judgment are resolved in favor of the Plaintiffs;

2. That this Court has jurisdiction over the subject matter of the action and all parties thereto;

3. That Plaintiff JOHN G. RINALDO LIMITED PARTNERSHIP NO. 14 purchased from Defendant ROADRUNNER LAKE PARKS, INC. a purported leasehold interest in the property described in Exhibit "1" of the Plaintiffs' Amended Complaint;

4. That as partial consideration therefor, Plaintiff JOHN G. RINALDO LIMITED PARTNERSHIP NO. 14 and JOHN G. RINALDO, Individually, executed a Promissory Note, a copy of which is attached to Plaintiffs' Amended Complaint as Exhibit "2", in the face amount of $332,215.36 in favor either of ROADRUNNER LAKE PARKS, INC., or of the alternative payees SHEPHERD TERMAN, IRVING GEYER, and RONALD WAINER.

5. That to secure this Note, Plaintiff JOHN G. RINALDO LIMITED PARTNERSHIP NO. 14 entered into a Deed of Trust, a copy of which is attached to Plaintiffs' Amended Complaint as Exhibit "3", with Defendant ARIZONA TITLE INSURANCE AND TRUST COMPANY as Trustee and Defendants ROADRUNNER LAKE PARKS, INC., and SHEPHERD TERMAN, IRVING GEYER and RONALD WAINER as beneficiaries.

6. That there arose between the Plaintiffs herein and Defendants ROADRUNNER LAKE PARK, INC., SHEPHERD TERMAN, IRVING GEYER and RONALD WAINER a number of disputes dealing with the purported sale or assignment of the above-described leasehold interest;

7. That ROADRUNNER LAKE PARKS, INC., and the Plaintiffs herein entered into a written Mutual

Release, a copy of which is attached to Plaintiffs' Amended Complaint as Exhibit "4";

8. That the terms of the Mutual Release are clear and unambiguous;

9. That the Mutual Release discharges, releases and satisfies, among other things, the obligation existing pursuant to the Promissory Note attached to Plaintiffs' Amended Complaint as Exhibit "2";

10. That the Plaintiff JOHN G. RINALDO LIMITED PARTNERSHIP NO. 14 is entitled to have reconveyed to it the legal title which Defendant ARIZONA TITLE INSURANCE AND TRUST COMPANY holds pursuant to the Deed of Trust attached to Plaintiffs' Amended Complaint as Exhibit "3";

11. That there exists no just reason for delay in the entry of Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Plaintiffs have partial summary judgment against the Defendants on Count I of the Amended Complaint;

2. That a mandatory injunction hereby issues directing Defendant ARIZONA TITLE INSURANCE AND TRUST COMPANY immediately to execute and deliver to Plaintiff JOHN G. RINALDO LIMITED PARTNERSHIP NO. 14 a Deed of Release and Reconveyance or such other legal document as is necessary to reconvey all right, titles and interest held by Defendant ARIZONA TITLE INSURANCE AND TRUST COMPANY pursuant to the Deed of Trust attached to Plaintiffs' Amended Complaint as Exhibit "3";

3. That Plaintiffs be awarded their reasonable costs;

4. That the Court expressly determines that

there exists no just reason for delay in the entry of Judgment and the Clerk is expressly directed to enter this Judgment immediately.

DONE IN OPEN COURT this 11th day of July, 1980.

Walter E. Craig

HONORABLE WALTER E. CRAIG,
U.S. DISTRICT COURT JUDGE

Appendix B — United States Court of Appeal for the Ninth Circuit

JOHN G. RINALDO LIMITED PARTNERSHIP NUMBER 14, JOHN G. RINALDO, and GAY TAVI RINALDO,	)	
Plaintiffs/Appellees.	)	
v.	)	
ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation,	)	CA No. 80-5559
	)	DC No. CIV 78-698
Defendant,	)	MEMORANDUM
ROADRUNNER LAKE PARKS, INC., an Arizona corporation, SHEPHERD TERMAN, IRVING E. GEYER, and RONALD Y. WAINER,	)	
Defendants/Appellants.	)	

Appeal from the United States District Court for the District of Arizona
Walter E. Craig, Senior District Judge, Presiding
Argued and submitted January 6, 1982

Before: CHOY, GOODWIN and FARRIS, Circuit Judges.

The Rinaldo partnership initiated this action to enjoin a trustee sale of certain real property which it had purchased from the Roadrunner corporation. Although the partnership had failed to make payments on the pur-

chase promissory note, it relied on a Mutual Release executed by the parties as part of the settlement of a state court action. The district court found that the terms of the Mutual Release were unambiguous and that it discharged the promissory note. Roadrunner appeals from the granting of summary judgment for the partnership. We reverse.

Neither the Mutual Release nor the settlement agreement of which it was a part made any specific reference to the Rinaldo partnership's obligation on the promissory note. When initially advised of Rinaldo's position that the Mutual Release extinguished the obligation on the promissory note, Roadrunner filed a motion in state superior court, before the same judge who had approved the settlement, asking that he set aside his order of dismissal of the lawsuit which had been settled by the agreement. The superior court judge was "a little shocked at the way Mr. Rinaldo took [the settlement]." The court held the settlement was "ineffective." The motion was granted because, "the dismissal was predicated upon a negotiated settlement the terms of which are unclear, not agreed to by both parties, ambiguous, and that there was therefore no mutual meeting of the minds of both parties as to that negotiated settlement between the parties of this case."

The superior court order setting aside the dismissal was affirmed by the Arizona Court of Appeals.

The Mutual Release was not an independent agreement; it was an integral part of the settlement agreement. Since the settlement agreement was set aside, the Mutual Release must necessarily fail for lack of consideration. Because Rinaldo's action is based on the Mutual Release, summary judgment should have been entered for Roadrunner. We understand the district court's failure to so conclude. The defense of inadequate consideration was first raised by Roadrunner in a motion

to amend its answer. This motion was made more than eight months after Roadrunner's first answer had been filed, and ten days after Rinaldo had moved for partial summary judgment. The district court denied the motion without explanation. Under all of the circumstances here, we deem the denial an abuse of discretion.

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "[T]his mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Here Rinaldo could not show any prejudice from allowance of the amendment. Passage of time alone, which under usual circumstances might justify the denial, cannot apply to grant a windfall under circumstances where there has been a clear failure of consideration. We recognize the plaintiff had done little to move the lawsuit along, but at the same time we cannot ignore the negligence of counsel for Roadrunner. Neither party is without fault in the delay in bringing the status of the matter before the district court. It is only because of the clear failure of consideration that we hold that the motion to amend should have been granted.

We reverse and remand for entry of summary judgment in favor of Roadrunner.

REVERSED and REMANDED

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN G. RINALDO LIMITED PARTNERSHIP NUMBER 14, JOHN G. RINALDO, and GAY TAVI RINALDO,	)	
Plaintiffs/Appellees, v.	)	
ARIZONA TITLE INSURANCE AND TRUST COMPANY, an Arizona corporation,	)	No. 80-5559
Defendant,	)	ORDER
ROADRUNNER LAKE PARKS, INC., an Arizona corporation, SHEPHERD TERMAN, IRVING E. GEYER, and RONALD Y. WAINER,	)	
Defendants/Appellants.	)	

Before: CHOY, GOODWIN, and FARRIS, Circuit Judges.

The petition for rehearing filed March 8, 1982 is denied.

Appendix D — In the Superior Court of the State of Arizona in and for the County of Maricopa

ROADRUNNER LAKE PARKS, INC., an Arizona corporation,	)	
Plaintiff,	)	
v.	)	
JOHN G. RINALDO LIMITED PARTNERSHIP NUMBER 14, a Limited Partnership; JOHN G. RINALDO, General Partner of John G. Rinaldo Limited Partnership Number 14; JOHN G. RINALDO and GAY TAVI RINALDO, his wife,	)	No. C-302411
Defendants.	)	

Phoenix, Arizona
November 12, 1976
8:25 a.m.

BEFORE: HON. STANLEY Z. GOODFARB

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Prepared for:
MR. WAYNE A. SMITH
Attorney at Law

(COPY)

Lea & Bleeker
Registered Professional Reporters
800 Title and Trust Building
Phoenix, AZ 85003
257-8514

Reported by: Jean L. Lea

be adequately represented by counsel. It is our position, Your Honor, that this matter simply is not before you. The release is not a matter of record and was not even attempted to be made a matter of record until 22 days after this lawsuit was finally dismissed.

THE COURT: But Rule 60(c) says it can be done within a reasonable time and one, two and three —

MR GALLAGHER: May it please the Court, I would direct the Court's attention in Rule 60(c) to the language that makes 60(c) applicable only to final orders or judgments or proceedings.

THE COURT: Well, isn't a dismissal a final order? Isn't the dismissal a final order?

MR. GALLAGHER: Judge, what are you going to put in the dismissal? He wants to litigate the effect of the release, an extrajudicial document —

MR. SMITH: That's incorrect. I don't want to litigate the effect of the release.

MR. GALLAGHER: Well, excuse me —

THE COURT: He wants to set aside the release, set aside the dismissal; that's all he wants to do.

MR. SMITH: Set aside the dismissal and —

THE COURT: I'm not going to litigate the release. I'll set aside the dismissal.

MR. GALLAGHER: For what error?

THE COURT: Because it was entered into on the basis of a mutual mistake or at least a mistake on his part. This is a matter of discretion with the Court, —

MR. GALLAGHER: Well, I agree.

THE COURT: — Mr. Gallagher.

MR. GALLAGHER: Your Honor, I am fully aware